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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 815

THE SEMINOLE NATION,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

PAUL M. NIEBELL,
Counsel for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

The Seminole Nation of Indians prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above case on October 7, 1940.

Opinion Below.

The opinion of the Court of Claims is not yet reported (R. 9-14).

Jurisdiction.

The judgment of the Court of Claims was entered on October 7, 1940 (R. 14). Motion for a new trial filed in the proceedings was overruled on January 6, 1941 (R. 15). The jurisdiction of this Court is invoked under Section 3

of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939 (Section 288 of the Judicial Code as amended, 28 U. S. C. A. 129), as further amended by the Act of May 22, 1939, c. 140, 53 Stat. 752.

Questions Presented.

The questions presented are as follows:

1. Whether the United States, the guardian of the Seminole Nation of Indians, can divest the title of its Indian ward to that part of its tribal estate known as Wewoka Townsite, by passing the Act of March 3, 1905, c. 1479, 33 Stat. 1048, 1068, confirming, with full knowledge of the facts, an illegal sale made by the tribal officials to the Principal Chief of the tribe in violation of the Semniole Agreement, c. 542, 30 Stat. 567, and at a grossly inadequate price; thus giving said tribal property away to persons not entitled thereto, without assuming an obligation to render just compensation to the Semniole Nation for the lands so taken under the Fifth Amendment to the Constitution of the United States.

In other words, whether the Act of March 3, 1905, is an act within the plenary power of Congress over Indian Affairs, or an act which took this Seminole tribal property under the power of eminent domain.

2. Whether a showing that the Seminole tribal officials sold tribal property to themselves at a grossly inadequate price, and during the time a fiduciary relationship existed between them and the tribe, is sufficient evidence to support a finding of fraud, in the absence of a showing that said sale was fair by the party seeking to sustain the transaction.

The petitioner contends that the United States took this Seminole tribal property under the power of eminent domain, and relies chiefly upon the decisions of this Court

in *United States* v. *The Creek Nation*, 295 U. S. 103; *United States* v. *Shoshone Indians*, 299 U. S. 476, and *United States* v. *Klamath and Moadoc Tribes*, 304 U. S. 119.

Statement.

The material facts are set forth in the findings of the court below and in extracts of the evidence below which are incorporated into the record, and are summarized as follows:

The Seminole Nation is one of the Five Civilized Tribes, the eastern lands of which were exchanged for those in what was then Indian Territory, now a part of the State of Oklahoma. By the Treaty of August 7, 1856, 11 Stat. 699, this tribe was given the right of limited self-government. However, as time went on the Governments of these tribes fell into the hands of a few able and energetic Indians, who, as officers, used their official positions to acquire large fortunes at the expense of the more backward members of the tribes (See *Stephens* v. *Cherokee Nation*, 174 U. S. 445, and *The Seminole Nation* v. *United States*, 82 C. Cls. 135).

To remedy this condition of affairs Congress passed what is known as the Curtis Act, approved June 28, 1898, c. 517, 30 Stat. 495, assuming thereunder full administrative control over the affairs of these tribes (*Cherokee Nation* v. *Hitchcock*, 187 U. S. 294).

The Original Seminole Agreement, ratified by Congress on July 1, 1898, c. 542, 30 Stat. 567, provided in substance for the allotment in severalty of the tribal lands and the distribution of the tribal funds to the members of the Seminole Nation. This claim has its origin in the terms of the Seminole Agreement.

The lands disposed of under the Seminole Agreement were acquired by the Seminole Nation by Treaty of March 21, 1866, 14 Stat. 755, and the Act of August 5, 1882, c. 390, 22 Stat. 257, 265.

Within the Seminole domain there was one townsite, that of Wewoka, the old capital of the Seminole Nation. Before the passage of the Seminole Agreement, and during the period the affairs of the Seminole Nation were controlled by the tribal officers, the Seminole Council passed what was known as the Seminole Townsite Act. This tribal act created a townsite commission composed of five members, one of which was A. J. Brown, Seminole Treasurer, and brother of John F. Brown, Principal Chief. This commission was authorized to segregate not more than 640 acres of tribal land for townsite purposes, to survey and divide the same into lots, blocks, streets and alleys. Section 4 of said tribal act provided in part as follows:

> "The said Commission shall have power to sell or lease the said town lots upon such terms and conditions and for such considerations as they may deem proper, and to execute leases as in their judgment may be for the best interests of the said town, the Seminole Nation and people. Provided, that no sale shall be made to non-citizens, whether Indians by blood or otherwise, until the tribal organization as such shall cease to exist, and provided that no transfer of the title of lots shall be made to any person or persons except upon the condition that a building or buildings or other valuable improvements shall be erected thereon within six months from date of lease or purchase of such lot or lots. Provided, that said Commissioners may in their discretion, for good cause shown, extend the time for the completion of such building, buildings or improvements."

Under the provisions of this act the townsite commissioners selected a tract of land not exceeding 640 acres within the boundaries of which were included improvements recently purchased by said A. J. Brown from another citizen (R. 18-19). At this time the title to this land was vested in the Seminole Nation, but the tribal act was so worded (Sec.

3, R. 7) that if a citizen had improvements on the lands selected, he was to be given one-fourth of said townsite property. Accordingly, 1102 lots of the 4234 lots in this townsite were conveyed to said A. J. Brown, Seminole Treasurer and Secretary of said townsite commission (R. 10-11).

The action of the commission in selecting, surveying and platting the townsite of Wewoka, together with the setting apart of lands to said A. J. Brown was reported to the National Council, but after the first report no further report of its action was made by the commission, as was required by the townsite act (R. 6-7, 24-25).

The tribal act was incorporated by reference into the Original Seminole Agreement between the Seminole Nation and the United States, ratified by Act of Congress, approved July 1, 1898, c. 542, 30 Stat. 567, which provides in part that:

> "The townsite of Wewoka shall be controlled and disposed of according to the provisions of an act of the General Council of the Seminole Nation, approved April 23d, 1897, relative thereto; and on extinguishment of the tribal government, deeds of conveyance shall issue to owners of lots as herein provided for allottees, and all lots remaining unsold at that time may be sold in such manner as may be prescribed by the Secretary of the Interior."

The provision of this agreement governing the issuance of said deeds reads as follows:

> "When the tribal government shall cease to exist the principal chief last elected by said tribe shall execute, under his hand and the seal of the Nation, and deliver to each allottee a deed conveying to him all the right, title, and interest of the said Nation and the members thereof in and to the lands so allotted to him, and the Secretary of the Interior shall approve such deed, and the same shall thereupon operate as relin-

> quishment of the right, title, and interest of the United States in and to the land embraced in said conveyance, and as a guarantee by the United States of the title of said lands to the allottee; and the acceptance of such deed by the allottee shall be a relinquishment of his title to and interest in all other lands belonging to the tribe, except such as may have been excepted from allotment and held in common for other purposes. * * *"

During the three years following the organization of the Seminole townsite commission seven lots were sold to a few influential members of the tribe for a total of $600.00 (R. 18, 21).

In February, 1900, John F. Brown, Principal Chief of the Seminole Nation, through his brother, A. J. Brown, submitted to the townsite commission an offer to purchase for $12,000.00, the lots remaining unsold in the townsite. This offer was accepted and a deed was executed by the commission to John F. Brown on February 12, 1900. This deed contained the following provision waiving the requirements of Section 4 of the tribal townsite act (R. 24):

> "* * * subject to the conditions named in said act as to the blocks for parks and public buildings, the said John F. Brown not being required, however, to erect buildings or improvements on the property herein conveyed except as to him seems reasonable and practicable but for good cause shown to us no definite time is named within which buildings or improvements shall be placed on said lots and the same is hereby indefinitely extended."

This deed was not approved by the Secretary of the Interior as required by the Seminole Agreement, nor was it ever submitted to him for approval.

No report of this private sale was made to the Seminole Council as was required by the townsite act, but at a special

session of the Council held in April, 1900, two months after the sale, a report was made by John F. Brown, and on April 18, 1900, the sale was ratified by act of the Seminole Council (R. 11, 24-25).

The Seminole Council was in sympathy with, dominated and influenced by the Browns (R. 16, 18, 18-20, 21-22).

Through several conveyances between the Browns and their wives these lots were transferred on June 6, 1901, to the Wewoka Realty and Trust Company, which was principally owned by John F. Brown and A. J. Brown. This company sold all or a part of these lots at an average price of from $80.00 to $200.00 a lot (R. 12).

Protests against the sale were made on behalf of a large number of the members of the Seminole Nation on the ground that the sale was in violation of the Seminole Agreement; that the price paid was inadequate; and that said sale was beneficial to the officials only (R. 11, 16, 18, 18-20). The Interior Department ordered an investigation of the facts and the facts thus disclosed were submitted to the Assistant Attorney General for the Interior Department for an expression as to the legality of said sale.

On March 19, 1904, Assistant Attorney General Campbell rendered an opinion holding in substance that the sale to the Browns was a violation of the tribal townsite act and the Seminole Agreement; that a fiduciary relationship existed between the Browns and the Seminole Nation and for that reason the bona fides of the transaction was in doubt; that being absolutely void the sale to the Browns did not pass the title of this tribal property to the Browns, and that the Seminole Council had no power to ratify or confirm said illegal and void acts (R. 22-29).

The Assistant Attorney General suggested that legislation be sponsored to give the Secretary of the Interior power to adjust the equities between the purchasers of town lots from the Wewoka Realty Company and the Seminole

Nation (R. 28-29). The proposed legislation was submitted to Congress along with a copy of the opinion of the Assistant Attorney General (R. 11-12, 30). Congress, however, did not enact the proposed legislation, but over the protest of the Secretary of the Interior and the Commissioner of Indian Affairs (R. 30-31) the following provision was inserted in the Indian Appropriation Act of March 3, 1905, c. 1479, 33 Stat. 1048, 1068:

> "That the resolutions of the Seminole council, passed and approved on April eighteenth, nineteen hundred, accepting and ratifying the contract and sale made by the Seminole townsite commissioners to John F. Brown, of the unsold lots in the town of Wewoka, Indian Territory, for the sum of twelve thousand dollars, and also providing for the distribution of the said money among the Seminole people per capita, be, and the same is hereby, ratified and confirmed."

By this act the title of the Wewoka Townsite property was divested from the Seminole Nation and given to the Brown brothers, who were not entitled to this property, and nothing has since been done by the United States to compensate the Seminole Nation for the value of this tribal property thus disposed of.

Specification of Errors to be Urged.

The court below erred:

1. In holding that the Act of March 3, 1905, confirming said illegal sale, with full knowledge of the facts, did not take the Wewoka townsite property from the Seminole Nation and give it away to persons not entitled thereto, and that the Seminole Nation is not entitled to just compensation for the value of said property under the Fifth Amendment to the Constitution of the United States.

2. In holding that said Act of March 3, 1905 was an act within the plenary power of Congress over the affairs of

an Indian tribe, rather than an act exercising the right of eminent domain.

3. In holding that the contention of petitioner would overthrow said Act of March 3, 1905 and make Congress a party to the fraud of the tribal officers, rather than in holding that the contention of petitioner is that said act was valid; that Congress had the right thereunder to take this Seminole tribal property; but that in so doing the United States assumed an obligation to render just compensation to the tribe for the property so taken.

4. In holding that the United States, as guardian of the Seminole Nation and having full administrative control over the affairs of its ward, and supervisory power over the sale of Wewoka townsite under the terms of the Seminole Agreement, was not in duty bound to protect the interests of said Seminole Nation, but rather had the right to confirm said illegal sale and thus give said property away to others not entitled thereto, without rendering just compensation for same to the Seminole Nation.

5. In holding that the sale of Wewoka townsite to John F. Brown, Principal Chief of the Seminole Nation, of over $400,000.00 worth of Seminole tribal property for the grossly inadequate price of $12,000.00, during the time a fiduciary relationship existed between the Seminole Nation and said John F. Brown, did not raise a presumption of fraud which would support such a finding in the absence of proof of the fairness of said sale by the party seeking to sustain it.

6. In failing to find as a fact that the Seminole Council was in sympathy with and completely influenced and dominated by the Browns, and that under the circumstances there was no freedom of action of said council in ratifying said sale.

7. In failing to find as a fact that the inadequacy of price paid by said tribal officers for said property was well known to the officers of the United States at the time of the passage of said Act of March 3, 1905.

8. In holding that the negligence of the administrative officers of the United States in failing to transmit to Congress the evidence before them of the inadequacy of the price paid by said Brown brothers would prejudice the rights of petitioner in claiming just compensation for the taking of its property under the power of eminent domain.

Reasons for Granting the Writ.

In the lower court the petitioner contended that the illegal sale of Wewoka Townsite to the officers of the Seminole Nation at a time when a fiduciary relationship existed between them and the tribe, at a grossly inadequate price, and in violation of the Seminole Agreement, did not divest the Seminole Nation of its title to this property; also that the United States as guardian of the Seminole Nation was in duty bound to protect the tribal estate from loss, after it had full knowledge of the facts concerning this illegal transaction.

The incorporation of the tribal townsite act into the Seminole Agreement between the United States and the Seminole Nation made the tribal act a part of that agreement, and the United States, as guardian of the Seminole Nation, had the right to demand of the Seminole townsite commission that both the tribal act and the provisions of the Seminole Agreement be strictly complied with. A violation of the townsite act would also be a violation of the Seminole Agreement.

The essence of the opinion of Assistant Attorney General Campbell, dated March 19, 1904, was that the sale to the

Browns passed no title to them. We quote from this opinion as follows (R. 26-27):

> "* * * The evident purpose of the Seminole Act of 1897 was to establish and build up a town and at the same time to secure to the nation the proceeds of the sale of lots therein. Upon the theory that these purposes would be accomplished by the honest administration of the tribal law Congress assented that the townsite should be disposed of in accordance with the provisions of said tribal law. The incorporation of such assent in the agreement approved by the Act of July 1, 1898, in effect read the tribal law into that agreement. That tribal law became to all intents and purposes a part of the compact between the Seminole Nation and the United States, so that the latter had and has the right to demand that the town lots shall be disposed of only as therein provided, and so that the Seminole Nation had thereafter no power to alter any provision of the tribal law or to condone any failure of the townsite commission to faithfully execute it.
>
> "That law did not contemplate the sale en bloc of the townsite, and the sale made by the commission of all lots, save about seven, at one time to the same purchasers, was beyond their powers. The fact that the principal chief and his brother, member and secretary of the commission, became the purchasers, is, of itself, sufficient to raise a doubt of the bona fides of the transaction, even if it did not, of itself, render the sale invalid. Persons holding fiduciary relations, such as A. J. Brown did in respect of the sale of this townsite, are not as a rule permitted to become purchasers at their own sale. Without, however, considering this phase of the matter, it seems clear that the commission exceeded their authority in making this sale of substantially the whole townsite to John F. and A. J. Brown.
>
> "The law required that buildings or other improvements should be erected on each lot leased or sold within six months from such lease or sale. The townsite commission might, for good cause shown, extend the time

for the completion of such building, buildings or improvements, but they had no power to waive this requirement. They did, however, in connection with this sale, in effect attempt to relieve the purchaser of any obligation to improve the lots or any of them by declaring the time for making improvements 'indefinitely extended.' They clearly exceeded their powers in this. Inasmuch, however, as the agreement ratified by the Act of July 1, 1898, provided that 'on extinguishment of the tribal government, deeds of conveyance shall issue to owners of lots as herein provided for allottees,' the matter is in condition that the mistake of the commission may yet be corrected. By the terms of that agreement deeds to allottees are to be approved by the Secretary of the Interior. Since, under the tribal law, no transfer of the title of lots may be made except upon condition of placing improvements thereon within six months, the Secretary would be justified in refusing to approve a deed to one who had not complied with the condition.

"The Tribal Act of 1897 contains no provision expressly authorizing the commission to convey or to execute deeds for the conveyance of town lots. The fact that they were expressly empowered to execute leases lends significance to the omission of a provision authorizing the execution of deeds. This power was evidently purposely withheld. Any doubt relative thereto is removed by that provision of the agreement ratified by the Act of July 1, 1898, supra, prescribing the manner of issuing deeds for town lots in Wewoka. Thereafter, at least, the commission clearly had no authority to issue any deed and their attempted conveyance to John F. Brown in 1900 was of no force or effect. It was void and the act of the National Council, purporting to ratify and confirm the transaction, could not give it vitality.

"The only conclusion to be reached is that the sale to Brown in this form and upon the terms made was beyond the powers of the townsite commission, that the deed to Brown under that sale was of no effect and that the council had no power to ratify or confirm these illegal and void acts."

It is a well-established principle of law that a trustee cannot buy in the trust property at the trustee's sale (Bogert on Trusts and Trustees, p. 1514). This principle alone would prevent the Browns buying this Seminole tribal property at their own private sale, and would cast a doubt upon the whole transaction, as was pointed out by the Assistant Attorney General.

In the lower court the petitioner also took the position that the sale to the Browns at a time when a fiduciary relationship existed between them and the Seminole Nation, coupled with the gross inadequacy of price, was a fraud upon the Seminole Nation in that the Browns took advantage of their official positions unjustly to enrich themselves at the expense of the other members of the tribe. The lower court decided that under the circumstances petitioner had not proven fraud, and stated further (R. 14):

> "* * * The sale was ratified by the Seminole Council on April 18, 1900. There is no proof that the Council was misled as to any fact within the knowledge of Brown, or that Brown had knowledge of any material fact which was not known to the Council. Mere inadequacy of price, if such be the case, is insufficient to establish fraud. * * *"

It was common knowledge that the Browns had absolute control not only over the property but also over the lives of the Seminoles (Cong. Rec., 54th Cong., 1st Sess., p. 2070). The record shows that the Browns, as Principal Chief and Treasurer of the tribe, controlled all tribal moneys and matters of credit, and completely dominated the Council, the terms of office and salaries of its members; also that these officers possessed such a power or influence over the Seminoles and the Council as to prevent the use of their independent judgment in approving the sale of the townsite (R. 16-17, 18, 18-20, 21-22). And as heretofore pointed out, this action of the Council was void.

It is true, as the lower court pointed out, that mere inadequacy of consideration, standing alone and without the existence of a fiduciary relationship between the parties, is not sufficient to establish fraud. But it is equally true that gross inadequacy of consideration coupled with the existence of a fiduciary relationship between the parties raises a presumption of fraud, and shifts the burden of proving the fairness of the transaction to the party seeking to sustain it.

In 24 Amer. Jur., p. 92, the rule is stated as follows:

> "The burden of proof is on a trustee who claims a benefit arising from a transaction with his beneficiary to show the utmost good faith on his part, that he took no advantage of his influence or knowledge, and that he communicated to the beneficiary everything which he knew concerning the transaction that the beneficiary should have known before entering into it. The rule that fraud is presumed in a transaction between persons in a confidential relationship, which results in an advantage to the one in whom confidence is reposed is applicable to a transaction between a general guardian and his ward. * * *"

And in 1 Ann. Cases, note, p. 811-812, it is stated:

> "The chief exception to the general rule that fraud will not be presumed but must be proved, arises from the existence of fiduciary or confidential relations between the parties. It is well settled that where it appears at the time of the transaction alleged to be fraudulent, as, for instance, the relation of trustee and cestui que trust, * * * or guardian and ward, or that one of the parties for any reason possessed a power or influence over the other, or that one of the parties was laboring under disability such as mental weakness or intoxication, the existence of such relation or such power or influence or such disability raises a presumption of fraud, and the burden of proof is upon the party seeking to sustain the transaction.
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> * * * * * * *

> "Mere inadequacy of price, or other inequality in a contract standing alone, is not sufficient to raise a presumption of fraud. * * * But inadequacy of price or other inequality may give rise to a presumption of fraud where it is so gross as to shock the conscience, or where it is accompanied by other conditions or circumstances, such as disability, confidential relations, etc."

Having shown that a fiduciary relationship existed between the parties, and also that the consideration paid by the Browns was so grossly inadequate as to shock the conscience, a presumption of fraud arises which is sufficient to support such a finding by the court (24 Amer. Jur., pp. 129-130); and in the absence of proof of the fairness of the sale by the party seeking to sustain it—that the Browns took no advantage of their influence or knowledge, or that they communicated to the Council everything which they knew concerning the transaction that the Council should have known before ratifying said sale—we made out our case against this illegal transaction.

It is submitted that the lower court erred in not giving effect to the above rule, and in placing the burden of proving the fairness of said illegal sale upon the ward instead of upon the party seeking to sustain it.

Our argument on the illegality of the sale to the Browns was directed chiefly to the fact that nothing before the Act of March 3, 1905 was done legally to divest the Seminole Nation of its vested interest and title to the Wewoka townsite property. Had the Seminole Nation been in a position to do so, it then could have brought suit to recover this townsite property from the Brown brothers. However, it was in a state of tutelage and was entitled to rely upon the United States, its guardian, for needed protection of its interests (*Creek* case, 295 U. S. 103).

The Duty of the United States to Protect Its Indian Ward From the Loss of Wewoka Townsite.

A large number of Seminole citizens had protested this illegal sale, and these protests resulted in a thorough investigation of the facts by the Interior Department and the opinion of the Assistant Attorney General above referred to. With all of this light before it, what then was the duty of the United States, the guardian of the Seminole Nation, with respect to this townsite property?

That the United States owed to its ward a strict duty of protecting its tribal estate from loss is well settled.

In *United States* v. *Creek Nation*, 295 U. S. 103, 110, in commenting upon the duty of the United States to the Creek Nation, this Court said:

> "It was in a state of tutelage and entitled to rely on the United States, its guardian, for needed protection of its interests."

The evident purpose of both the Seminole townsite act and the Seminole Agreement was to secure to the Seminole Nation the proceeds of the sale of its share of Wewoka townsite. The United States was in duty bound to see that both the tribal act and the terms of the Seminole Agreement were strictly complied with.

Under the Seminole Agreement the United States assumed supervisory power over the sale of Wewoka townsite. The approval of deeds to town lots by the Secretary of the Interior was made a condition precedent to the passing of title to purchasers of town lots. By withholding his approval, the Secretary could prevent the transfer of title. This provided a final check against the wrongful administration of the law by the Seminole townsite commission (Op. Asst. Atty. Genl., *supra*, pp. 11-12).

Therefore, under the terms of the Seminole Agreement,

the Secretary had the power to step in and correct the wrong done to the Seminole Nation by the illegal sale of Wewoka townsite, for at no time did the Secretary approve the deed of the townsite commission to the Browns, or any deeds to town lots issued by the Wewoka Realty and Trust Company to purchasers from this company. In fact, the Secretary directed the United States Inspector for Indian Territory to inform these purchasers that the sale to Brown was illegal and that the purchasers of town lots from the Browns would not receive valid title (R. 29).

The Seminole Agreement further provided that:

> "All lots remaining unsold at that time may be sold in such manner as may be prescribed by the Secretary of the Interior."

Under this provision the Secretary had authority to sell the unsold town lots for the benefit of the Seminole Nation. In commenting upon this provision Commissioner of Indian Affairs Tonner, in a communication to the Secretary, stated as follows (R. 21):

> "The saving clause was the provision of the Seminole Agreement of July 1, 1898, that ended the limitation when the Government ceased to exist, and vested in the Secretary of the Interior authority to sell the remaining lots to any who might wish to buy. *It was not intended that the lack of capital or enterprise among the Seminole people should create an opportunity for influential citizens of the nation to take advantage of the conditions, to betray their trust, and speculate upon them. Under the authority vested in the Interior Department it would have been possible to sell the unsold lots after March 4, 1906, at a good figure—realizing several times the amount paid by Brown if sold according to the method pursued in the other nations in Indian Territory.* * * *" (Italics ours.)

Therefore, the United States, being under a plain duty to protect the Seminole Nation from the loss of Wewoka town-

site, and having ample authority to do so under the terms of the Seminole Agreement, utterly and completely failed in this duty; and, notwithstanding its thorough knowledge of the facts and the illegal nature of the sale to the Browns, the United States nevertheless confirmed said sale, thus giving this townsite property away to the Browns, and causing the loss of which petitioner now complains.

The United States Appropriated Wewoka Townsite Under Said Act of March 3, 1905.

Over the protest of the Secretary of the Interior and the Commissioner of Indian Affairs (R. 29-30), there was included in the Indian Appropriation Act, approved March 3, 1905, c. 1479, 33 Stat. 1048, 1068, the following provision:

> "That the resolutions of the Seminole council, passed and approved on April eighteenth, nineteen hundred, accepting and ratifying the contract and sale made by the Seminole townsite commissioners to John F. Brown, of the unsold lots in the town of Wewoka. Indian Territory, for the sum of twelve thousand dollars, and also providing for the distribution of the said money among the Seminole people per capita, be, and the same is hereby, ratified and confirmed."

Was this an act within the plenary power of Congress over the affairs of an Indian tribe, or was this an act which gave tribal property away to others not entitled thereto, and consequently took said property from the tribe without rendering just compensation for the value of same?

We submit that the lower court erred in failing to apply to this act the test laid down by this Court to determine the character of the action by the United States in its dealings with its Indian wards. This test is outlined in the *Creek* case, in which this Court said (295 U. S. 103, 109-110):

> "* * * The tribe was a dependent Indian community under the guardianship of the United States,

> and therefore its property and affairs were subject to the control and management of that government. But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions. It did not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them; for that 'would not be an exercise of guardianship, but an act of confiscation.' Lane *v.* Pueblo of Santa Rosa, 249 U. S. 110, 113; Cherokee Nation *v.* Hitchcock, 187 U. S. 294, 307-308."

Therefore, the power of the United States to control and manage Indian property was not absolute, but was limited to action for "protecting and advancing the tribe," and the United States could not give "tribal lands to others," or "appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them."

Let us apply this test to the Act of March 3, 1905. This act ratified and confirmed an act of the Seminole Council which purported to ratify a sale of Wewoka Townsite by the Seminole townsite commission to the Principal Chief of the Seminole Nation for $12,000.00. At the time this act was passed it was well known to the United States and its officers that said act of the Seminole Council was null and void; that said sale was a violation of the Seminole Agreement and the tribal townsite act; that said sale was made when a fiduciary relationship existed between the Seminole Nation and the Browns; that the consideration was grossly inadequate; and that said sale was a fraud upon the Seminole Nation in that said tribal officers were taking advantage of their official positions unjustly to enrich themselves at the expense of the other members of the tribe.

Under these circumstances can it properly be held that said Act of 1905 had for its purpose "protecting and advancing the tribe"? It would be difficult to convince of this act as being one that protected the tribal property from loss or advanced the interests of the tribe, when it confirmed this illegal sale and thus gave this property to persons not entitled thereto. Rather, "protecting and advancing the tribe" would have required the United States to repudiate the illegal sale, and to take steps to carry out the terms of the Seminole Agreement under which this property—the unsold lots—was directed to be sold by the Secretary of the Interior for the benefit of the Seminole Nation.

In the *Creek* case (295 U. S. 103) this Court held that the inaction of the United States after it had full knowledge of the facts constituted a confirmation of the wrongs done by its administrative officers to the Creek Nation, and created a taking of Creek lands which implied an undertaking on the part of the United States to make just compensation to the tribe under the Fifth Amendment to the Constitution. In the case at bar the facts concerning the illegal sale were known to the United States when the Act of March 3, 1905 was passed. That the confirmation of this wrong and the disposal of this Seminole tribal property were accomplished by an act of Congress would not alter the effect of the action of the United States (*United States* v. *Mille Lac Band of Chippewa Indians*, 229 U. S. 495, 509-510).

In *United States* v. *Klamath Indians*, 304 U. S. 119,*

* In the first proceeding in the *Klamath* case, 296 U. S. 244, referred to by the lower court, the Klamath Indians had released their claims to the United States and accepted, as consideration for said release, an amount fixed by Act of Congress. This Court held that the right of Congress to fix the amount of public money to be given by the United States for this release, and to prescribe the terms upon which said amount was to be paid to the Indians, could not be questioned; and as the jurisdictional act did not waive the release, it was binding on the Indians and barred recovery. This decision could have no bearing on the case at bar for no such release was given by the Seminole Indians.

$2,980,000.00 worth of tribal lands were given away to others for a small payment to the Klamath Indians of $108,750.00, under Acts of June 21, 1906, c. 3504, 34 Stat. 325, 368, and of April 30, 1908, c. 152, 35 Stat. 70, 92. This Court held that the United States took these tribal lands under said acts, and stated as follows (*supra*, pp. 123, 124-125):

> "It is appropriate first to observe that while the United States has power to control and manage the affairs of its Indian wards in good faith for their welfare, that power is subject to constitutional limitations, and does not enable the United States without paying just compensation therefor to appropriate lands of an Indian tribe to its own use or to hand them over to others. Chippewa Indians *v.* United States, 301 U. S. 358, 375, and cases cited. * * *
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> "'* * * Unquestionably, Congress had power to direct the exchange and for that purpose to authorize expropriation of plaintiffs' lands. The validity of its enactments is not questioned. The taking was to enable the Government to discharge its obligation, whether legal or merely moral is immaterial, to make restitution of the allotted lands. The taking was *in invitum*, specifically authorized by law, a valid exertion of the sovereign power of eminent domain. It therefore implied a promise on the part of the Government to pay plaintiffs just compensation. Jacobs *v.* United States, supra.
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> "'* * * The taking was consummated pursuant to the Act of 1906; it was ratified by appropriation and payment under the Act of 1908. It implied a promise to pay just compensation. Clearly the lands in question were not 'wrongfully appropriated.'"

In the second proceeding in the *Klamath* case, 304 U. S. 119, referred to above, the release had been expressly waived by Act of Congress, and this Court then proceeded to settle finally the rights of the parties.

Clearly the Act of March 3, 1905 divested the Seminole Nation of its Wewoka townsite property, the United States giving it to the Browns who were not entitled thereto.

In its opinion the lower court stated that (R. 13):

> "The United States did not appropriate the land for its own benefit, nor did it appropriate it for the benefit of another, unless the sale to Brown was fraudulent and the United States was a party to the fraud. If the United States participated in any fraud that may have been committed, it did so in the passage of the act of March 3, 1905."

We submit that this conclusion is not justified under the circumstances in this case. The contention of petitioner does not endeavor to convict Congress of participating in the fraud committed by the tribal officers, but upholds the validity of the Act of March 3, 1905; it admits that Congress has the right to take these Seminole tribal lands from the Seminole Nation and give them to the Browns under said Act of 1905, but petitioner contends that when Congress exercises that right it assumes an obligation to pay just compensation to the Seminole Nation for the lands so taken under the Fifth Amendment to the Constitution.

The lower court attached considerable significance to the fact that the evidence of the inadequacy of price was not before Congress at the time of the passage of the Act of March 3, 1905. In their many protests the Seminoles commented upon the inadequacy of the price paid for this townsite property. In the protest of August 21, 1901 (R. 18) it is stated:

> "* * * The Townsite Committee of the tribe took upon itself authority to set aside a U. S. Treaty, and sell the site to a party who paid to the tribe in an unexplained manner a minimum of its value"

The protest of February 23, 1903, sent to the Attorney General and to the Secretary of the Interior, stated (R. 19):

> "* * * Lots have been sold from $1500.00 to $40.00. $4.00 was no just compensation besides being irregular and contrary to law. * * *."

And the Commissioner of Indian Affairs in his letter to the Secretary, dated February 29, 1904, stated (R. 21):

> "* * * Under the authority vested in the Interior Department, it would have been possible to sell the unsold lots after March 4, 1906, at a good figure—realizing several times the amount paid by Brown if sold according to the method pursued in the other nations in Indian Territory * * *."

Thus it is shown that the United States had ample knowledge of the inadequacy of the price paid by the Browns for the Wewoka townsite property.

In the communication of the Commissioner of Indian Affairs to the Secretary of the Interior, dated February 6, 1905, recommending against the ratification of said illegal sale by Congress, the Commissioner referred to the correspondence and the opinion of Assistant Attorney General Campbell as showing that Wewoka townsite was not disposed of in accordance with law (R. 29-30). The Commissioner's letter was transmitted to the Chairman of the Senate Indian Affairs Committee by letter of the Secretary of the Interior, dated February 7, 1905, in which the Secretary stated that he concurred in the recommendation of the Commissioner that the proposed amendment to ratify said illegal sale be not enacted into law (R. 30-31). Had Congress so desired it could have called for this correspondence. The mere fact that it did not do so, and that the administrative officers of the United States failed to transmit it to Congress, certainly would not alter the effect of said Act of 1905

or prejudice the rights of the Seminole Nation in claiming just compensation for its lands taken under said act.

We submit that said Act of 1905—which confirmed the illegal sale to the Browns, divested the Seminole Nation of its property, and gave it away to others not entitled thereto—would not be an act having for its purpose the protection and advancement of the interests of this tribe, but rather it would fall within that part of the language of the *Creek* case, *supra,* wherein this Court stated that the United States could not give tribal lands to others not entitled to them "without rendering, or assuming an obligation to render, just compensation for them," for that "would not be an exercise of guardianship, but an act of confiscation." And, in the language of the *Shoshone* case decision, 299 U. S. 476, 498, "Spoliation is not management."

For the reasons above set forth it is earnestly requested that the writ of certiorari should be granted.

Respectfully submitted,

PAUL M. NIEBELL,
Attorney for Petitioner.

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